RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-____

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

1. Epic Systems Corporation, petitioner on review, was the defendant-appellant below.

2. Jacob Lewis, respondent on review, was the plaintiff-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

Epic Systems Corporation has no parent corporation, and no publicly held company owns 10% or more of Epic Systems Corporation's stock.

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RULE:

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PETITION FOR A WRIT OF CERTIORARI

Epic Systems Corporation (Epic) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 823 F.3d 1147. The District Court's opinion denying Epic's motion to dismiss and compel individual arbitration is not published in the *Federal Supplement*, but it is available at 2015 WL 5330300.

JURISDICTION

The judgment of the Seventh Circuit was entered on May 26, 2016. On July 29, 2016, Justice Kagan extended the time within which to file a petition for a

writ of certiorari to and including September 23, 2016. *See* No. 16A93. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA).

The FAA provision at issue states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C. § 2.]

Two provisions of the NLRA are at issue. The first, Section 7 of the NLRA, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

> labor organization as a condition of employment as authorized in section 158(a)(3) of this title. [29 U.S.C. § 157.]

The second, Section 8 of the NLRA, states:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title * * *. [*Id.* § 158(a).]

INTRODUCTION

This case is about the enforceability of arbitration agreements under the FAA. As a matter of federal substantive law, the FAA establishes a presumption in favor of enforcing arbitration agreements as written. *See* 9 U.S.C. § 2. This presumption may be overcome by another federal statute, but only—as the Court has recently reaffirmed—if that statute qualifies as a "congressional command" that is "contrary" to the FAA's enforcement mandate. *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012). The question presented here arises in the context of employer-employee agreements that require employment-related disputes to be resolved through individual arbitration and not class or collective arbitration. It asks whether Section 7 of the NLRA, which gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, qualifies as a contrary congressional command sufficient to overcome the FAA's presumption that these agreements should be enforced according to their terms.

The courts are squarely divided over this important and recurring question. Three federal courts of appeals (the Second, Fifth, and Eighth Circuits) and two state courts of last resort (the California and Nevada Supreme Courts) have concluded that the answer is no: agreements to submit employment disputes to individual arbitration are fully enforceable. Two other federal courts of appeals (the Seventh and Ninth Circuits)—as well as the National Labor Relations Board—have concluded that the answer is yes: these agreements are unenforceable because they bar class and collective proceedings. Thus the outcome of a case deciding the question presented will depend on whether the case is filed in one circuit or another—and, in the Ninth Circuit, on whether the case is litigated in state or federal court. This divergence in authority renders the dispute-resolution process in employer-employee relationships unpredictable, to the detriment of employers and employees alike.

The question presented has been fully ventilated and the subject of both majority and dissenting opinions by eminent jurists. This Court's intervention is needed now to resolve the acknowledged and intractable split. The petition should be granted.

STATEMENT

1. Epic Systems Corporation is a Wisconsin-based company that makes software for recording, organizing, and sharing healthcare data. Across the country, Epic's software is used every day by hospitals, academic medical facilities, retail clinics, safety-net providers, and other healthcare organizations. Epic relies on its own employees to develop, install, and maintain its software.

In April 2014, Epic sent an email to many of its employees. Pet. App. 2a. Contained within the email was an arbitration agreement. *Id.* The email asked recipients to review and acknowledge the agreement by responding in one of two ways: the recipients could either confirm that they understood and consented to the agreement, or they could request that someone contact them about it. *Id.*; C.A. App. 15.

One day after receiving the email, Jacob Lewis, who was then a technical communications employee of Epic, responded by acknowledging that he understood and consented to the terms of the arbitration agreement. Pet. App. 2a. In doing so, Lewis "agree[d] to use binding arbitration, instead of going to court, for any 'covered claims'"—a category that the agreement specifically defined as including any "claimed violation of wage-and-hour practices or procedures under local, state or federal statutory or common law." *Id.* at 30a-31a.

The arbitration agreement also contained a "Waiver of Class and Collective Claims." *Id.* at 31a. By accepting that waiver, Lewis "agree[d] that covered claims will be arbitrated only on an individual basis," and "waive[d] the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id.* The agreement further provided that "if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction." *Id.* at 35a.

2. Lewis continued to work for Epic until December 2014. C.A. App. 9. Then, in February 2015,

Lewis sued Epic in federal court on behalf of a putative class and collective of technical communications employees, claiming that they had been denied overtime wages in violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, and Wisconsin law. Pet. App. 2a.

Epic moved to dismiss the complaint and compel individual arbitration, citing the arbitration agreement to which Lewis had consented. *Id.* Although Lewis acknowledged that his claims fell within the scope of that agreement, the District Court denied Epic's motion. *Id.* at 24a, 29a. According to the District Court, the waiver of class and collective proceedings was unenforceable because it violated the right of employees to engage in "concerted activities" under Section 7 of the NLRA. *Id.* at 25a-28a (quoting 29 U.S.C. § 157).

3. Epic appealed, *see* 9 U.S.C. § 16(a), and the Seventh Circuit affirmed.

Turning first to the NLRA, the court concluded that "[a] collective, representative, or class legal proceeding is *** a 'concerted activit[y]'" under NLRA Section 7. Pet. App. 10a (brackets in original). And because Section 8 of the NLRA prohibits an employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1), the court held that the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

Only then did the court turn to the FAA, asking whether that statute "resuscitates" the waiver. *Id.* at 12a. The court concluded that it does not, because of the FAA's saving clause. *Id.* at 15a. Under that clause, an arbitration agreement may be rendered

unenforceable by "such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 14a-15a (quoting 9 U.S.C. § 2). And according to the court, "[i]llegality is one of those grounds." *Id.* at 15a. The court thus held that the waiver was "unenforceable" even under the FAA. *Id.* at 20a. In doing so, the court acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), had come "to the opposite conclusion." Pet. App. 15a. The court nevertheless proceeded to "create a conflict in the circuits." *Id.* at 15a n.†.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The split of authority in this case is clear, acknowledged, and undisputed. The federal courts of appeals and state courts of last resort are divided, five to two, on whether the NLRA overcomes the FAA's presumption that arbitration agreements are enforceable as written, when the agreement at issue submits employment-related disputes to individual arbitration.

1. The Second, Fifth, and Eighth Circuits, as well as the Supreme Courts of California and Nevada, have each determined that provisions waiving class and collective arbitration in the employment context are enforceable under the FAA.

a. The Fifth Circuit has squarely and repeatedly upheld class waivers in employment-related arbitration agreements. Starting with *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), the court

rejected a decision by the National Labor Relations Board (NLRB or Board), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Fifth Circuit considered and rejected the Board's determination that the FAA's saving clause was "a basis for invalidating" class waivers due to their purported illegality under the NLRA. 737 F.3d at 360. The Board's analysis was flawed, the court explained, because its finding of illegality had "the effect of *** disfavor[ing] arbitration." *Id.* at 359 (citing *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 346 (2011)). That type of illegality is not a "ground[] *** for the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added); it is a ground that specifically targets arbitration, *D.R. Horton*, 737 F.3d at 360. The court therefore concluded that the defense falls outside the saving clause. *Id.*

After dispensing with the Board's reasoning, the Fifth Circuit proceeded to the analysis required by this Court's precedent in cases where a party seeks to avoid arbitration based on another federal statute such as the NLRA. The court asked whether the NLRA is "'a contrary congressional command'" that overcomes the FAA's presumption favoring arbitration. *Id.* (quoting *CompuCredit*, 132 S. Ct. at 669). The Fifth Circuit answered no: "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* In so holding, the Fifth Circuit recognized that "[e]very one of our sister circuits to consider the issue" has "held arbitration agreements containing class waivers enforceable," and the court was "loath to create a circuit split." *Id.* at 362. The proper resolution,

therefore, was straightforward: a class waiver "must be enforced according to its terms." *Id.*

The Fifth Circuit has adhered to this view consistently for the last three years. It has done so in the face of serial challenges to its decisions from the NLRB—challenges that are mounted whenever aggrieved parties elect to file petitions to review NLRB rulings in the Fifth Circuit. *See Citi Trends, Inc.* v. *NLRB*, No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc.* v. *NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); *Chesapeake Energy Corp.* v. *NLRB*, 633 F. App'x 613, 615 (5th Cir. 2016) (per curiam) (unpublished); *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015). *See also infra* pp. 22-24 (discussing how the NLRA's judicial review provision, 29 U.S.C. § 160(f), allows a party to petition for review of an NLRB decision in one of several different courts of appeals).

b. The Eighth Circuit also has concluded that employment arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. *See Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013); *see also* NLRB C.A. Amicus Br. 23-24 (identifying the Eighth Circuit as aligned with the Fifth Circuit). In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are unenforceable, but the court specifically "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d

at 1055. The court instead found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id.* at 1052-1055.

Applying that presumption, the Eighth Circuit followed this Court's rule that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id.* at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669). The two potential contrary congressional commands alleged in *Owen* were the FLSA and the NLRA. *Id.* at 1053-1054. The Eighth Circuit concluded that neither statute sufficed to "override[] the mandate of the FAA in favor of arbitration." *Id.* at 1055. Because Congress had reenacted the FAA in 1947, *after* passing both of those statutes, the court reasoned, "Congress intended its arbitration protections to remain intact even in light of the earlier passage of * * * major labor relations statutes." *Id.* at 1053.

The Eighth Circuit reaffirmed its *Owen* decision just a few months ago, in *Cellular Sales*, 824 F.3d 772. That case came before the court of appeals on a petition to review the NLRB's ruling "'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA." *Id.* at 776. The court granted the petition in relevant part, explaining that the "holding in *Owen* is fatal" to the NLRB's position. *Id.* Under *Owen*, an "arbitration agreement that include[s] a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

c. The Second Circuit agrees with the Fifth and Eighth Circuits. *See Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam). It too has held that a class waiver in an

employment arbitration agreement is enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). The court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. And like the Eighth Circuit before it, the Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8.[1]

d. The validity of class and collective waivers under the FAA and the NLRA has reached state courts of last resort as well. The Supreme Courts of California and Nevada have both upheld class waivers in employment arbitration agreements. *See Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 137-143 (Cal. 2014); *Tallman* v. *Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122-123 (Nev. 2015). The California Supreme Court reached its decision by adopting the Fifth Circuit's *D.R. Horton* analysis. *See Iskanian*, 327 P.3d at 141-142. And the Nevada Supreme Court did the same, citing *Iskanian*. *See Tallman*, 359 P.3d at 123.

2. On the other side of the split are the Seventh and Ninth Circuits.

---

[1] Several other circuits have similarly held that the FAA demands enforcement of class waivers in employment arbitration agreements, albeit without expressly discussing the NLRA in their decisions. *See Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).

a. The Seventh Circuit broke from its sister circuits in the decision below, expressly recognizing that its opinion "would create a conflict in the circuits." Pet. App. 15a n.†. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are *not* enforceable under the NLRA and the FAA. The panel concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Id.* at 10a-11a. And it determined that such waivers are unenforceable under the FAA's saving clause because illegality is a "'ground[] *** for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2); *see id.* at 20a.

The court acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a. But the Seventh Circuit minimized the Fifth Circuit's reasoning as relying on mere "dicta" from this Court's decisions in *Concepcion* and *Italian Colors*. *Id.* As for the Second and Eighth Circuits, the panel did not dispute that these "two circuits agree with the Fifth," but it deemed the analysis from those circuits to be "substantively" insufficient. *Id.* at 19a (citing *Sutherland* and *Owen*).

b. The Ninth Circuit has now joined the Seventh. In *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), a divided panel held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. Echoing the Seventh Circuit's decision, the majority concluded that the FAA's saving clause

"caus[es] the FAA's enforcement mandate to yield" to the NLRA. *Id.* at *7. In so holding, the majority acknowledged that it was widening a circuit split: Although it "agree[d] with the Seventh Circuit," the majority "recognize[d] that [its] sister Circuits are divided on this question." *Id.* at *10 n.16.

Judge Ikuta dissented. She described the majority's decision as "breathtaking in its scope and in its error." *Id.* at *11. In her view, the NLRA was not a contrary congressional command that overrode the FAA's enforcement mandate. *Id.* at *12-*14. Judge Ikuta stressed that the majority's decision otherwise was "directly contrary to Supreme Court precedent and join[ed] the wrong side of a circuit split." *Id.* at *11.

3. This split of authority is now fully developed, acknowledged, and ripe for resolution by this Court. The competing pronouncements from the courts of appeals and state courts of last resort have vetted the arguments on both sides. Five of these courts have upheld class and collective waivers under the FAA and the NLRA; two others have invalidated them. As more courts take a side in this dispute, the split becomes less likely to resolve itself. And because the issue is a discrete question of statutory interpretation, it is unlikely to benefit from further percolation. This Court should intervene now to resolve it.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS AND WAS INCORRECT.

This Court's intervention is also needed because the Seventh Circuit's decision was mistaken on the

a. The Seventh Circuit broke from its sister circuits in the decision below, expressly recognizing that its opinion "would create a conflict in the circuits." Pet. App. 15a n.†. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are *not* enforceable under the NLRA and the FAA. The panel concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Id.* at 10a-11a. And it determined that such waivers are unenforceable under the FAA's saving clause because illegality is a "'ground[] *** for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2); *see id.* at 20a.

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II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS AND WAS INCORRECT.

This Court's intervention is also needed because the Seventh Circuit's decision was mistaken on the

merits of the important question presented. The court claimed that it was "harmoniz[ing]" the FAA with the NLRA. Pet. App. 16a. Instead, it was disregarding this Court's instructions about how to interpret arbitration agreements under the FAA and misreading the NLRA to boot.

A. The FAA Controls The Enforceability Of Arbitration Agreements Absent Contrary Congressional Command.

Federal statutes are not all on equal footing when it comes to arbitration agreements. The FAA is "[t]he background law governing" questions relating to the enforcement of an arbitration provision, even when other federal statutes are at issue. *CompuCredit*, 132 S. Ct. at 668. It "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* at 669 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). More particularly, the type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. *Concepcion*, 563 U.S. at 348, 351.

Under the FAA, the default rule is enforceability: "A written provision *** to settle by arbitration a controversy *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, "[t]he burden is on the party opposing arbitration *** to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987); *see also Moses H. Cone*, 460 U.S. at 24-25 (explaining that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration"). That is why, for decades, this Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *McMahon*, 482 U.S. 220; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Moses H. Cone*, 460 U.S. 1; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Consistent with the strong federal policy favoring arbitration, the FAA "requires courts to enforce agreements to arbitrate according to their terms[,] * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *McMahon*, 482 U.S. at 226); *see Morris*, 2016 WL 4433080, at *12-*14 (Ikuta, J., dissenting). This contrary congressional command cannot be "obtuse," but rather must indicate Congress's contrary intent with some "clarity." *CompuCredit*, 132 S. Ct. at 672. And, as stated, the directive must be "congressional," *id.* at 669—not administrative or judicial.

B. The Court of Appeals Failed To Follow The Requisite *CompuCredit* Analysis.

1. The court of appeals below erred when it expressly declined to evaluate whether the NLRA is a "contrary congressional command," as *CompuCredit*

requires. *See* Pet. App. 13a. It concluded that the *CompuCredit* analysis would "put[] the cart before the horse." *Id.* The court perceived a preceding, and ultimately superseding, obligation "to see if the two statutes conflict." *Id.* Above all else, the court said, it was required to "harmonize" the FAA with the NLRA. *Id.* at 14a, 16a. In this way, the court of appeals started in the wrong place and conducted the wrong analysis—and the result of its backward methodology was to nullify, not harmonize.

The court of appeals should have begun the analysis with the FAA—specifically, the Act's presumption that arbitration agreements are enforceable as written. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 668-669; *Moses H. Cone*, 460 U.S. at 24-25. It should have imposed the burden on the party opposing arbitration (Lewis) to show that the agreement was unenforceable, resolving all doubts in favor of arbitration. *McMahon*, 482 U.S. at 227. And it should have asked whether the NLRA was a congressional command "contrary" to the FAA. *CompuCredit*, 132 S. Ct. at 669.

Instead, the court began with the NLRA and imposed the "burden" "to show that the FAA clashes with the NLRA" on the party seeking to enforce arbitration (Epic). Pet. App. 14a. The court also asked the wrong question: whether the NLRA's protection of employees' right to engage in "concerted activities" *could* be read to cover class and collective proceedings. *Id.* at 3a-9a. And only after the court answered the wrong question affirmatively did it consider, as a secondary inquiry, whether the FAA "resuscitates" the class waiver. *Id.* at 12a. The court's analysis thus was flawed from start to finish.

2. Under the standards this Court has laid down, the NLRA is not a "contrary congressional command" that bars class waivers in arbitration agreements. *CompuCredit*, 132 S. Ct. at 669; *see Morris*, 2016 WL 4433080, at *14-*16 (Ikuta, J., dissenting). Section 7 of the NLRA does not expressly prohibit class waivers; it grants employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To qualify as a contrary congressional command, therefore, Section 7 would have to actually give employees the right to arbitrate or litigate a dispute as a class or collective action. But that interpretation is not compelled by the statutory language, and it makes little sense.

If the NLRA were indeed the source of employees' putative right to proceed as a class or collective action in litigation or arbitration, employees could commence such proceedings directly under the NLRA. *See Bekele* v. *Lyft, Inc.*, No. 15-cv-11650, 2016 WL 4203412, at *20 (D. Mass. Aug. 9, 2016) (criticizing the decision below, including on this ground), *appeal docketed*, No. 16-2109 (1st Cir. Aug. 30, 2016). They presumably could have done so even before the federal rules were revised to provide for class litigation of legal claims. *See generally Italian Colors*, 133 S. Ct. at 2311 (describing the advent of Federal Rule of Civil Procedure 23). Yet there was no rush to the courthouse by employees seeking a class or collective remedy under the NLRA, then or now, because no such right exists.

Moreover, if NLRA Section 7 gives employees the right to proceed in a class or collective action, NLRA Section 8 makes it an unfair labor practice for an

employer "to interfere with" that "right[]." 29 U.S.C. § 158(a)(1). The logical consequence is that any employer opposition to employees' efforts to certify a class or collective action or arbitration "interfere[s] with" the employees' "right[]." *See id.* That would make certification of class or collective actions *automatic* when they are brought by employees against their employer. *See Bekele*, 2016 WL 4203412, at *20 (making a similar observation). Nothing in the NLRA suggests that was Congress's intended result, however. Accordingly, the NLRA does not give employees a right to proceed in class arbitration, and certainly not a right that trumps the FAA's presumption that arbitration agreements are enforceable as written.

C. The Court Of Appeals' Analysis Is Not Salvageable Through the FAA's Saving Clause.

1. The court of appeals said it found support for its decision in the FAA's saving clause, which provides that an arbitration agreement is enforceable "'save upon such grounds as exist at law or in equity for the revocation of any contract.'" Pet. App. 14a-15a (quoting 9 U.S.C. § 2). The court reasoned as follows: the class waiver here is "illegal" under Section 7 of the NLRA; "illegality" is a defense allowing for the revocation of a contract; therefore, the case falls within the FAA's saving clause, and there is no conflict between the NLRA and the FAA. *Id.* at 15a.

In this way, the court of appeals used the saving clause as a means to sidestep the analysis required by *CompuCredit*. Under its reasoning, there is never any need to determine whether another federal statute qualifies as a contrary congressional com-

mand because the saving clause allows courts to decide simply whether the other federal law *could* be interpreted to disfavor arbitration. That rule would eviscerate the presumption of enforceability created by the FAA, however, converting enforcement into the exception rather than the rule. *See Morris*, 2016 WL 4433080, at *16-*17 (Ikuta, J., dissenting).

2. The court of appeals' analysis is also wrong. The saving clause allows courts to decline to enforce arbitration agreements based on generally applicable contract defenses; that is, those that provide "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). A defense that exists only because of the presence of a particular arbitration provision in a contract is not generally applicable. As *Concepcion* explained, "when a doctrine normally thought to be generally applicable, such as duress or *** unconscionability, is *** applied in a fashion that disfavors arbitration," it falls outside the saving clause. 563 U.S. at 341. Likewise, a defense that precludes the waiver of class or collective arbitration is not truly generally applicable: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; *cf. Italian Colors*, 133 S. Ct. at 2310, 2312 & n.5 (relying on *Concepcion*'s general analysis in a case where the law competing with the FAA was federal, and rejecting the dissent's "dismiss[al]" of *Concepcion* as "a case involving pre-emption"). *But see Morris*, 2016 WL 4433080, at *17 (Ikuta, J., dissenting) (stating that this Court "does not apply the saving[] clause to federal statutes").

The court of appeals in this case interpreted the NLRA to render class or collective waivers in employment arbitration agreements illegal. But that illegality-based defense—which arises only in *some* contracts, not "*any* contract," 9 U.S.C. § 2 (emphasis added)—can hardly be likened to classic universal defenses such as fraud and mistake. Instead, it has the effect of "conditioning enforcement of arbitration on the availability of class procedure." *Italian Colors*, 133 S. Ct. at 2312. Under *Concepcion*, that means the defense disfavors arbitration and is not generally applicable. *See* 563 U.S. at 341, 344. Accordingly, the saving clause does not apply, and the Seventh Circuit's decision is wrong on the merits.

III. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE FOR BOTH EMPLOYERS AND EMPLOYEES.

The question presented in this case holds critical importance to employers and employees around the country. Arbitration agreements with class and collective waivers are commonly used in the employment context, but the split of authority over the enforceability of those waivers creates tremendous uncertainty for employers and employees alike. And the problem is particularly acute for entities whose operations span multiple circuits.

1. The viability of class and collective arbitration waivers affects a broad spectrum of industries across the country. Consider the range of companies whose cases are part of the split of authorities: Epic (healthcare software), D.R. Horton (home construction), Murphy (convenience stores), Bristol Care (residential care services), Cellular Sales of Missouri

(telecommunications retail), Ernst & Young (professional services), Bloomingdale's (department stores), CLS Transportation (trucking), and CPS Security (security services; in *Tallman*, the Nevada Supreme Court case). Beyond those cases, class and collective arbitration waivers are used in a wide variety of employment contexts. *See, e.g.*, *Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574 (6th Cir. 2014) (foodservice); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014) (automobile repair); *Raniere* v. *Citigroup Inc.*, 533 F. App'x 11 (2d Cir. 2013) (unpublished) (financial services); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (temporary staffing); *Bekele*, 2016 WL 4203412 (ride-hailing); *Bell* v. *Ryan Transp. Serv., Inc.*, No. 15-9857, 2016 WL 1298083 (D. Kan. Mar. 31, 2016) (third-party logistics); *Morvant* v. *P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012) (restaurants).

Unsurprisingly, then, the enforceability of class waivers in employment arbitration agreements is an issue that arises frequently. Since the NLRB's 2012 *D.R. Horton* decision—which declared class and collective waivers in employment arbitration agreements invalid under the NLRA—the Board has handled "a steady stream of cases, by now numerous," on the same issue. *Century Fast Foods, Inc.*, No. 31-CA-116102, 2015 WL 1885197 (N.L.R.B. Apr. 24, 2015). In just the short time since the Seventh Circuit's decision below, the Board has issued at least ten new administrative decisions applying the same view of the FAA and the NLRA that it has

advanced since 2012.[2] The NLRB's approach, combined with the continued flow of private suits, ensures that this issue will recur frequently in the federal courts.

2. The divide among the authorities on this frequently recurring question is particularly problematic because of the NLRA's judicial-review provision, 29 U.S.C. § 160(f). That provision broadly allows those aggrieved by NLRB decisions to seek review in (1) the circuit "wherein the unfair labor practice in question was alleged to have been engaged," (2) the circuit "wherein such person resides or transacts business," or (3) the D.C. Circuit. *Id.* Because "[t]he Board may well not know which circuit's law will be applied on a petition for review," *Murphy Oil*, 808 F.3d at 1018, the Board has held firm to its view that class waivers in employment arbitration agreements are unenforceable, even after its decisions have been overturned again and again by certain courts of

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[2] *See, e.g.*, *Arise Virtual Sols., Inc.*, No. 12-CA-144223, 2016 WL 4362210 (N.L.R.B. Aug. 12, 2016) (applying the Board's position and noting that "the courts of appeals are now split"); *Briad Wenco, LLC*, No. 29-CA-165942, 2016 WL 3626602 (N.L.R.B. July 6, 2016); *Grill Concepts Servs., Inc.*, 364 N.L.R.B. 36 (June 30, 2016); *Bristol Farms*, 364 N.L.R.B. 34 (July 6, 2016); *Scherzinger Corp.*, No. 09-CA-165460, 2016 WL 3383761 (N.L.R.B. June 17, 2016) (adhering to the same position and stating that the Seventh Circuit's opinion opened "a circuit split that will likely have to be resolved by the Supreme Court" (footnote omitted)); *California Commerce Club, Inc.*, 364 N.L.R.B. 31 (June 16, 2016); *SJK, Inc.*, 364 N.L.R.B. 29 (June 16, 2016); *Rim Hosp.*, No. 21-CA-137250, 2016 WL 3345349 (N.L.R.B. June 15, 2016); *Adriana's Ins. Servs., Inc.*, 364 N.L.R.B. 17 (May 31, 2016); *Lincoln E. Mgmt. Corp.*, 364 N.L.R.B. 16 (May 31, 2016).

appeals. Thus, employers located in the Second, Fifth, and Eighth Circuits will continue to be subjected to NLRB enforcement actions against their use of class waivers. And when the NLRB inevitably finds that the waivers are unenforceable, the employers must go through the hassle of filing a petition for review, even though the issue has been decided squarely in their favor in those circuits.

The Fifth and Eighth Circuits have already confronted this problem. The Fifth Circuit has rejected the Board's position in four additional cases since *D.R. Horton*. *Citi Trends*, 2016 WL 4245458, at *1 ("The Board concedes, as it must, that its order contravenes our published decisions * * * , [but] this Court is bound by its prior published decisions."); *PJ Cheese*, 2016 WL 3457261, at *1 (granting the employer's motion for summary disposition); *Chesapeake Energy*, 633 F. App'x at 615 ("[N]o intervening change in the law permits reconsideration of our precedent."); *Murphy Oil*, 808 F.3d at 1018, 1021 (neither "celebrat[ing]" nor "condemn[ing]" the Board's "nonacquiescence" to the Fifth Circuit's *D.R. Horton* decision, but rebuking the Board for "hold[ing] that an employer who followed the reasoning of [the] *D.R. Horton* decision had no basis in fact or law * * * in doing so"). The Eighth Circuit has likewise rebuffed the Board in another opinion published after *Owen*. *Cellular Sales*, 824 F.3d at 776 (noting that the Eighth Circuit had rejected the Board's request to reconsider *Owen*, a precedent that the Board recognized was "fatal" to its contentions).

Absent action by this Court, courts will continue to face repeat litigation on this question. In the meantime, Section 160(f)'s review procedures will leave

enforcement of employment arbitration agreements with class waivers uncertain for both employers and employees.

3. The proper resolution of this issue thus carries significant implications for the employer-employee relationship. Employers need to know whether class waivers in arbitration provisions will actually be enforced. Employees need to know whether they are actually bound by these provisions. Without a decision by this Court establishing a uniform rule, the law governing a given dispute will remain unclear until the case is litigated--and the place of filing dictates the rule that applies.

The split of authority is especially troublesome for companies with employees in workplaces across the United States. So long as this split persists, large employers will need to have one set of employment policies for employees in the Seventh and Ninth Circuits, and another set of policies for employees elsewhere. And even then, employers operating in California or Nevada cannot know which law will govern, because the answer will depend on whether litigation is brought in state or federal court.

In effect, the decision below "condition[s] enforcement of arbitration on the availability of class procedure," *Italian Colors*, 133 S. Ct. at 2312, despite this Court's admonition that "[r]equiring the availability of classwide arbitration * * * creates a scheme inconsistent with the FAA," *Concepcion*, 563 U.S. at 344. And yet this is the choice now faced by employers in the Seventh and Ninth Circuits: if they want to resolve employment disputes through arbitration, class arbitration must be kept available. The result is a regime that—at least in those two circuits—

disfavors arbitration and the "'lower costs, greater efficiency and speed'" that attend individual arbitration, contrary to the purpose of the FAA. *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

This Court's review is therefore needed, now. Only this Court can rectify the myriad problems caused by competing standards for employment arbitration agreements. Only this Court can establish a uniform standard for employers and employees nationwide. And only this Court can bring predictability and stability back to the dispute-resolution process in employer-employee relationships.

4. Finally, this case is an excellent vehicle to decide the question presented. The question was pressed below, fully briefed by the parties and amici (including the NLRB), and passed on by the court of appeals. The question was the single issue on appeal, and the court of appeals' resolution of the issue was the sole basis for its decision. And in that decision, the court acknowledged that it was departing from the holdings of other courts of appeals.

Moreover, the parties to this case—an employer and an employee—are best situated to represent the two opposing viewpoints on the issue. They are the real parties in interest subject to both the FAA and the NLRA: their arbitration agreement is governed by the FAA, and their employer-employee relationship is governed by the NLRA. They have the most direct stake in courts' interpretations of these statutes and therefore are the parties most acutely interested in the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15-2997

JACOB LEWIS,

Plaintiff - Appellee,

v.

EPIC SYSTEMS CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 15-cv-82-bbc – Barbara B. Crabb, *Judge*.

ARGUED FEBRUARY 12, 2016 – DECIDED MAY 26, 2016

Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and BLAKEY, *District Judge*.*

WOOD, *Chief Judge*. Epic Systems, a health care software company, required certain groups of employees to agree to bring any wage-and-hour claims against the company only through individual arbitration. The agreement did not permit collective arbitration or collective action in any other forum. We conclude that this agreement violates the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, *et seq.*, and is also unenforceable under the

*Of the Northern District of Illinois, sitting by designation.

Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.* We therefore affirm the district court's denial of Epic's motion to compel arbitration.

I

On April 2, 2014, Epic Systems sent an email to some of its employees. The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived "the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding." The agreement included a clause stating that if the "Waiver of Class and Collective Claims" was unenforceable, "any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction." It also said that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." Epic gave employees no option to decline if they wanted to keep their jobs. The email requested that recipients review the agreement and acknowledge their agreement by clicking two buttons. The following day, Jacob Lewis, then a "technical writer" at Epic, followed those instructions for registering his agreement.

Later, however, Lewis had a dispute with Epic, and he did not proceed under the arbitration clause. Instead, he sued Epic in federal court, contending that it had violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.* and Wisconsin law by misclassifying him and his fellow technical writers and thereby unlawfully depriving them of overtime pay. Epic moved to dismiss Lewis's claim and compel individual arbitration. Lewis responded

that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection and was therefore unenforceable. The district court agreed and denied Epic's motion. Epic appeals, arguing that the district court erred in declining to enforce the agreement under the FAA. We review *de novo* a district court's decision to deny a motion to compel arbitration. *Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1033 (7th Cir. 2012).

II

A

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 enforces Section 7 unconditionally by deeming that it "shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1). The National Labor Relations Board is "empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* § 160(a).

Contracts "stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]" are unlawful and may be declared to be unenforceable by the Board. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) ("[I]t will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them,

would violate the Board's order or be inconsistent with any part of it[.]"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Wherever private contracts conflict with [the Board's] functions, they obviously must yield or the [NLRA] would be reduced to a futility."). In accordance with this longstanding doctrine, the Board has, "from its earliest days," held that "employer-imposed, individual agreements that purport to restrict Section 7 rights" are unenforceable. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 at *5 (2012) (collecting cases as early as 1939), *enf'd in part and granted in part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). It has done so with "uniform judicial approval." *Id.* (citing as examples *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169, 172 (7th Cir. 1941), *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941), and *NLRB v. Adel Clay Products Co.*, 134 F.2d 342 (8th Cir. 1943)).

Section 7's "other concerted activities" have long been held to include "resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (collecting cases). Similarly, both courts and the Board have held that filing a collective or class action suit constitutes "concerted activit[y]" under Section 7. See *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act."); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (same); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (single employee's

filing of a judicial petition constituted "concerted action" under NLRA where "supported by fellow employees"); *D.R. Horton*, 357 N.L.R.B. No. 184, at *2 n.4 (collecting cases). This precedent is in line with the Supreme Court's rule recognizing that even when an employee acts alone, she may "engage in concerted activities" where she "intends to induce group activity" or "acts as a representative of at least one other employee." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984).

Section 7's text, history, and purpose support this rule. In evaluating statutory language, a court asks first "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 570 (7th Cir. 2012). In doing so, it "giv[es] the words used their ordinary meaning." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (internal citation omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The NLRA does not define "concerted activities." The ordinary meaning of the word "concerted" is: "jointly arranged, planned, or carried out; coordinated." *Concerted*, NEW OXFORD AMERICAN DICTIONARY 359 (3d ed. 2010). Activities are "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *Id.* at 16. Collective or class legal proceedings fit well within the ordinary understanding of "concerted activities."

The NLRA's history and purpose confirm that the phrase "concerted activities" in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies. (There is no hint that it is limited to actions taken by a formally recognized union.) Congress recognized that, before the NLRA, "a single employee was helpless in dealing with an employer," and "that union was essential to give laborers opportunity to deal on an equality with their employer." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). In enacting the NLRA, Congress's purpose was to "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal Systems*, 465 U.S. at 835. Congress gave "no indication that [it] intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *Id.*

Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that the class action procedure allows plaintiffs who would otherwise "have no realistic day in court" to enforce their rights); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (noting that class suits allow those "individually in a poor position to seek legal redress" to do so, and that "an effective and inclusive group remedy" is necessary to ensure proper enforcement of rights). Given Section 7's intentionally broad sweep, there is no reason to

think that Congress meant to exclude collective remedies from its compass.

Straining to read the term through our most Epic-tinted glasses, "concerted activity" might, at the most, be read as ambiguous as applied to collective lawsuits. But even if Section 7 *were* ambiguous—and it is not—the Board, in accordance with the reasoning above, has interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies. See *D.R. Horton*, 357 N.L.R.B. No. 184, at *5. The Board's interpretations of ambiguous provisions of the NLRA are "entitled to judicial deference." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992). This Court has held that the Board's views are entitled to *Chevron* deference, see *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998), and the Supreme Court has repeatedly cited *Chevron* in describing its deference to the NLRB's interpretation of the NLRA, see, *e.g.*, *Lechmere*, 502 U.S. at 536; *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987). The Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it.

Epic argues that because the Rule 23 class action procedure did not exist in 1935, when the NLRA was passed, the Act could not have been meant to protect employees' rights to class remedies. See FED. R. CIV. P. 23 (Committee Notes describing the initial 1937 version of the rule and later amendments). We are not persuaded. First, by protecting not only employees' "right to self-organization, to form, join, or assist labor

organizations, [and] to bargain collectively through representatives of their own choosing" but also "*other* concerted activities for the purpose of ... other mutual aid or protection," Section 7's text signals that the activities protected are to be construed broadly. 29 U.S.C. § 157 (emphasis added); see *City Disposal Systems*, 465 U.S. at 835. There is no reason to think that Congress intended the NLRA to protect only "concerted activities" that were available at the time of the NLRA's enactment.

Second, the contract here purports to address *all* collective or representative procedures and remedies, not just class actions. Rule 23 may have been yet to come at the time of the NLRA's passage, but it was not written on a clean slate. Other class and collective procedures had existed for a long time on the equity side of the court: permissive joinder of parties, for instance, had long been part of Anglo-American civil procedure and was encouraged *in* 19th-century federal courts. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7 FEDERAL PRACTICE AND PROCEDURE § 1651 (3d ed. 2015) (noting that federal equity courts encouraged permissive joinder of parties as early as 1872). As early as 1853, it was "well established" that representative suits were appropriate "where the parties interested are numerous, and the suit is for an object common to them all." *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) (allowing representative suit on behalf of more than 1,500 Methodist preachers). In fact, representative and collective legal procedures have been employed since the medieval period. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987) (discussing group litigation in England occurring as

early as 1199 C.E.). The FLSA itself provided for collective and representative actions when it was passed in 1938. See, *e.g.*, *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390 n.3 (1942) (allowing suits by employees on behalf of "him or themselves and other employees similarly situated" (quoting FLSA, 29 U.S.C. § 216(b))).

Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's plain language controls, *GTE Sylvania*, 447 U.S. at 108, and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees' access to such remedies.

B

The question thus becomes whether Epic's arbitration provision impinges on "Section 7 rights." The answer is yes.

In relevant part, the contract states "that covered claims will be arbitrated only on an individual basis," and that employees "waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." It stipulates that "[n]o party may bring a claim on behalf of other individuals, and any arbitrator hearing [a] claim may not: (i) combine more than one individual's claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective or representative proceeding." It notes that "covered claims" include any "claimed violation

of wage-and-hour practices or procedures under local, state, or federal statutory or common law." It thus combines two distinct rules: first, any wage-and-hour dispute must be submitted to arbitration rather than pursued in court; and second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal.

Insofar as the second aspect of its provision is concerned, Epic's clause runs straight into the teeth of Section 7. The provision prohibits any collective, representative, or class legal proceeding. Section 7 provides that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. A collective, representative, or class legal proceeding is just such a "concerted activit[y]." See *Eastex*, 437 U.S. at 566; *Brady*, 644 F.3d at 673; *D.R. Horton*, 357 N.L.R.B. No. 184, at *2-3. Under Section 8, any employer action that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]" constitutes an "unfair labor practice." 29 U.S.C. § 158(a)(1). Contracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NRLA are unenforceable. See *Nat'l Licorice Co.*, 309 U.S. at 361; *D.R. Horton*, 357 N.L.R.B. No. 184, at *5.

We are aware that the circuits have some differences of opinion in this area, although those differences do not affect our analysis here. The Ninth Circuit has held that an arbitration agreement mandating individual arbitration may be enforceable where the employee had the right to opt out of the agreement without penalty, reasoning that the

employer therefore did not "interfere with, restrain, or coerce" her in violation of Section 8. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014). The Ninth Circuit's decision in *Johnmohammadi* conflicts with a much earlier decision from this court, which held that contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights in violation of Section 8. See *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). *Stone*, which has never been undermined, held that where the "employee was obligated to bargain individually," an arbitration agreement limiting Section 7 rights was a *per se* violation of the NLRA and could not "be legalized by showing the contract was entered into without coercion." *Id.* ("This is the very antithesis of collective bargaining." (citing *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 890 (7th Cir. 1940))). The Board has long held the same. See *D.R. Horton*, 357 N.L.R.B. No. 184, at *5-7 (citing *J.H. Stone & Sons*, 33 N.L.R.B. 1014 (1941) and *Superior Tanning Co.*, 14 N.L.R.B. 942 (1939)). (In *Johnmohammadi*, the Ninth Circuit, without explanation, did not defer to the Board.) We have no need to resolve these differences today, however, because in our case, it is undisputed that assent to Epic's arbitration provision was a condition of continued employment. A contract that limits Section 7 rights that is agreed to as a condition of continued employment qualifies as "interfer[ing] with" or "restrain[ing] . . . employees in the exercise" of those rights in violation of Section 8(a)(1). 29 U.S.C. § 157(a)(1).

In short, Sections 7 and 8 of the NLRA render Epic's arbitration provision unenforceable. Even if

this were not the case, the Board has found that substantively identical arbitration agreements, agreed to under similar conditions, violate Sections 7 and 8. See *D.R. Horton*, 357 N.L.R.B. No. 184; *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), *enf'd in part and granted in part, Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). We conclude that, insofar as it prohibits collective action, Epic's arbitration provision violates Sections 7 and 8 of the NLRA.

III

That would be all that needs to be said, were it not for the Federal Arbitration Act. Epic argues that the FAA overrides the labor law doctrines we have been discussing and entitles it to enforce its arbitration clause in full. Looking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case. The contract imposes two rules: (1) no collective action, and (2) proceed in arbitration. But it does not stop there. It also states that if the collective-action waiver is unenforceable, then any collective claim must proceed in court, not arbitration. Since we have concluded in Part II of this opinion that the collective-action waiver is incompatible with the NLRA, we could probably stop here: the contract itself demands that Lewis's claim be brought in a court. Epic, however, contends that we should ignore the contract's saving clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus. We reject this reading of the two laws.

In relevant part, the FAA provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in "response to judicial hostility to arbitration," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), its purpose was "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Federal statutory claims are just as arbitrable as anything else, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). The FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses,' . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

Epic argues that the NLRA contains no "contrary congressional command" against arbitration, and that the FAA therefore trumps the NLRA. But this argument puts the cart before the horse. Before we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). In order for there

to be a conflict between the NLRA as we have interpreted it and the FAA, the FAA would have to mandate the enforcement of Epic's arbitration clause. As we now explain, it does not.

A

Epic must overcome a heavy presumption to show that the FAA clashes with the NLRA. "[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros*, 515 U.S. at 533 (applying canon to find FAA compatible with other statute) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Moreover, "[w]hen two statutes complement each other"—that is, "each has its own scope and purpose" and imposes "different requirements and protections"—finding that one precludes the other would flout the congressional design. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (internal citations omitted). Courts will harmonize overlapping statutes "so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Implied repeal should be found only when there is an "'irreconcilable conflict' between the two federal statutes at issue." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (quoting *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982)).

Epic has not carried that burden, because there is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is "no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel*

Corp. v. Mullins, 455 U.S. 72, 77 (1982). The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Illegality is one of those grounds. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) (noting that illegality is a ground preventing enforcement under § 2). The NLRA prohibits the enforcement of contract provisions like Epic's, which strip away employees' rights to engage in "concerted activities." Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove.

B

In *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit came to the opposite conclusion.† 737 F.3d at 357. Drawing from dicta that first appeared in *Concepcion*, 563 U.S. at 348, and was then repeated in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), the Fifth Circuit reasoned that because class arbitration sacrifices arbitration's "principal advantage" of informality, "makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "greatly increases risks to defendants," and "is poorly suited to the higher stakes of class litigation," the "effect of requiring

†Because this opinion would create a conflict in the circuits, we have circulated it to all judges in active service under Circuit Rule 40(e). No judge wished to hear the case en banc.

class arbitration procedures is to disfavor arbitration." *D.R. Horton*, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 348-52); see also *Italian Colors*, 133 S. Ct. at 2312. The Fifth Circuit suggested that because the FAA "embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements," *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted), any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA. See *D.R. Horton*, 737 F.3d at 360 ("Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.").

There are several problems with this logic. First, it makes no effort to harmonize the FAA and NLRA. When addressing the interactions of federal statutes, courts are not supposed to go out *looking* for trouble: they may not "pick and choose among congressional enactments." *Morton*, 417 U.S. at 551. Rather, they must employ a strong presumption that the statutes may both be given effect. See *id.* The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA.

Indeed, finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is in fact *pro*-arbitration: it expressly allows unions and employers to arbitrate disputes between each other, see 29 U.S.C. § 171(b), and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58

(2009); *City Disposal Systems*, 465 U.S. at 836-37. The NLRA does not disfavor arbitration; in fact, it is entirely possible that the NLRA would not bar Epic's provision if it were included in a collective bargaining agreement. See *City Disposal Systems*, 465 U.S. at 837. ("[I]f an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, [it] is free to negotiate a provision in [its] collective-bargaining agreement that limits the availability of such methods."). If Epic's provision had permitted collective arbitration, it would not have run afoul of Section 7 either. But it did not, and so it ran up against the substantive right to act collectively that the NLRA gives to employees.

Neither *Concepcion* nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA, nor does either case hold that an arbitration clause automatically precludes collective action even if it is silent on that point. In *Concepcion*, the Supreme Court found incompatible with the FAA a state law that declared arbitration clauses to be unconscionable for low-value consumer claims. See *Concepcion*, 563 U.S. at 340. The law was directed toward arbitration, and it was hostile to the process. Here, we have nothing of the sort. Instead, we are reconciling two federal statutes, which must be treated on equal footing. The protection for collective action found in the NLRA, moreover, extends far beyond collective litigation or arbitration; it is a general principle that affects countless aspects of the employer/employee relationship.

This case is actually the inverse of *Italian Colors*. There the plaintiffs argued that requiring them to litigate individually "contravene[d] the policies of the antitrust laws." 133 S. Ct. at 2309. The Court rejected this argument, noting that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." With regard to the enforcement of the antitrust laws, the Court commented that "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). In this case, the shoe is on the other foot. The FAA does not "pursue its purposes at all costs"—that is why it contains a saving clause. *Id.* If these statutes are to be harmonized—and according to all the traditional rules of statutory construction, they must be—it is through the FAA's saving clause, which provides for the very situation at hand. Because the NLRA renders Epic's arbitration provision illegal, the FAA does not mandate its enforcement.

We add that even if the dicta from *Concepcion* and *Italian Colors* lent itself to the Fifth Circuit's interpretation, it would not apply here: Sections 7 and 8 do not mandate class arbitration. Indeed, they say nothing about class arbitration, or even arbitration generally. Instead, they broadly restrain *employers* from interfering with employees' engaging in concerted activities. See 29 U.S.C. §§ 157, 158. Sections 7 and 8 stay *Epic's* hand. (This is why, in addition to its being waived, Epic's argument that Lewis relinquished his Section 7 rights fails.) Epic acted unlawfully in attempting to contract with Lewis to waive his Section 7 rights, regardless of whether Lewis agreed to that contract. The very formation of the contract was illegal. See *Italian*

Colors, 133 S. Ct. at 2312 (Thomas, J., concurring) (noting, in adopting the narrowest characterization of the FAA's saving clause of any Justice, that defenses to contract formation block an order compelling arbitration under FAA).

Finally, finding the NLRA in conflict with the FAA would render the FAA's saving clause a nullity. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). Illegality is a standard contract defense contemplated by the FAA's saving clause. See *Buckeye Check Cashing*, 546 U.S. at 444. If the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says.

Epic warns us against creating a circuit split, noting that at least two circuits agree with the Fifth. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (rejecting argument that there is inherent conflict between NLRA/Norris LaGuardia Act and FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (rejecting NLRA-based argument without analysis); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting "[w]ithout deciding the issue" that a number of courts have "determined that they should not defer to the NLRB's decision in *D.R. Horton*"). Of these courts, however, none has engaged substantively with the relevant arguments.

The FAA contains a general policy "favoring arbitration and a liberal federal policy favoring

arbitration agreements." *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted). Its "substantive command" is "that arbitration agreements be treated like all other contracts." See *Buckeye Check Cashing*, 546 U.S. at 447. Its purpose is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12 (holding that FAA's saving clause prevents enforcement of both void and voidable arbitration contracts). "To immunize an arbitration agreement from judicial challenge on" a traditional ground such as illegality "would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'" *Id.* (applying same principle to fraud in the inducement). The FAA therefore renders Epic's arbitration provision unenforceable.

C

Last, Epic contends that even if the NLRA does protect a right to class or collective action, any such right is procedural only, not substantive, and thus the FAA demands enforcement. The right to collective action in section 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute. See *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Employ't Relations Bd.*, 315 U.S. 740, 750 (1942) ("[Section 7] guarantees labor its 'fundamental right' to self-organization and collective bargaining." (quoting *Jones & Laughlin Steel*, 301 U.S. 1, 33)); *D.R. Horton*, 357 N.L.R.B. No. 184, at *12 (noting that the Section 7 right to concerted action "is the core substantive right protected by the NLRA and is

the foundation on which the Act and Federal labor policy rest"). That Section 7's rights are "substantive" is plain from the structure of the NLRA: Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects. Compare 29 U.S.C. § 157 with *id.* §§ 151-169. One of those rights is "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," *id.* § 157; "concerted activities" include collective, representative, and class legal proceedings. See *Eastex*, 437 U.S. at 566; *Brady*, 644 F.3d at 673; *D.R. Horton*, 357 N.L.R.B. No. 184, at *2-3.

The Supreme Court has held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). (Contrary to the Fifth Circuit's assertion in *D.R. Horton*, the Supreme Court has never held that arbitration does not "deny a party any statutory right." 737 F.3d at 357.)

Arbitration agreements that act as a "prospective waiver of a party's *right to pursue* statutory remedies" —that is, of a substantive right—are not enforceable. *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19). Courts routinely invalidate arbitration provisions that interfere with substantive statutory rights. See, *e.g.*, *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626 (7th Cir. 2002) (holding unenforceable arbitration agreement that did not provide for award of attorney fees in accordance with right guaranteed

by Title VII); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding unenforceable arbitration provision precluding treble damages available under federal antitrust law); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (holding unenforceable and severing clause in arbitration agreement proscribing exemplary and punitive damages available under Title VII); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (same); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (holding unenforceable arbitration agreement that limited remedies under Title VII); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (same).

Epic pushes back with three arguments, but none changes the result. It points out the Federal Rule of Civil Procedure 23 simply creates a procedural device. We have no quarrel with that, but Epic forgets that its clause also prohibits the employees from using *any* collective device, whether in arbitration, outside of any tribunal, or litigation. Rule 23 is not the source of the collective right here; Section 7 of the NLRA is. Epic also notes that courts have held that other employment statutes that provide for Rule 23 class actions do not provide a substantive right to a class action. See, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act (ADEA)); *D.R. Horton*, 737 F.3d at 357 (citing court of appeals cases for FLSA). It bears repeating: just as the NLRA is not Rule 23, it is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process. See 29 U.S.C. §§ 216(b), 626. The NLRA does. See *id.* § 157. Epic's third argument is that

because Section 7 deals with *how* workers pursue their grievances—through concerted action—it must be procedural. But just because the Section 7 right is associational does not mean that it is not substantive. It would be odd indeed to consider associational rights, such as the one guaranteed by the First Amendment to the U.S. Constitution, non-substantive. Moreover, if Congress had meant for Section 7 to cover only "concerted activities" related to collective bargaining, there would have been no need for it to protect employees' "right to . . . engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*." 29 U.S.C. § 157 (emphasis added).

IV

Because it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes, Epic's arbitration provision violates Sections 7 and 8 of the NLRA. Nothing in the FAA saves the ban on collective action. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 15-cv-82-bbc

LEWIS, J.,
individually and on behalf of
all others similarly situated,

Plaintiff,

v.

EPIC SYSTEMS CORPORATION,

Defendant.

OPINION AND ORDER

Plaintiff J. Lewis was a technical writer for defendant Epic Systems Corporation. In this proposed collective action, plaintiff contends that defendant misclassified his position as exempt from the requirement to pay overtime wages under the Fair Labor Standards Act. Defendant has filed a motion to dismiss the case on the ground that plaintiff's claims are subject to an arbitration agreement. Dkt. #19. Plaintiff concedes that his claims fall within the scope of the arbitration agreement, but he argues that the agreement is invalid because it is unconscionable. Alternatively, he says that the court should invalidate the provision in the agreement called "Waiver of Class and Collective Claims," which requires employees to arbitrate claims "only on an individual basis."

In this case, it makes sense to consider the second argument first because it may be dispositive. As plaintiff points out, the arbitration agreement includes the following "savings clause": "[I]f the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims." Dkt. #22-1 at 3. Thus, if I conclude that the waiver is invalid, plaintiff's challenge to the rest of the arbitration agreement is moot.

As the parties acknowledge, I considered a similar waiver in an arbitration agreement in Herrington v. Waterstone Mortgage Corp., No. 11-cv-779-bbc (W.D. Wis.). In that case, the agreement stated that "[s]uch arbitration may not be joined with or join or include any claims by any persons not party to this Agreement." In an order dated March 16, 2012, I concluded that the waiver was inconsistent with In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), available at 2012 WL 36274, in which the National Labor Relations Board held that an employer violates the National Labor Relations Act by entering into individual arbitration agreements that include a prohibition on collective actions by employees.

The board's reasoning was straightforward. Under the NLRA, "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Both courts and the board have found consistently that lawsuits for unpaid wages brought by multiple plaintiffs may be one type of "concerted activity" protected by §§ 157 and 158(a)(1). Brady v. National

Football League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); Leviton Manufacuring Co., Inc. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973) ("[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith."); Saigon Gourmet Restaurant, 353 NLRB No. 110 (2009) ("[A] wage and hour lawsuit [is] clearly protected concerted activity."); In re 127 Restaurant Corp., 331 NLRB 269, 269 (2000) (lawsuit filed on behalf of 17 employees regarding wages was protected activity); 52nd Street Hotel Associates, 321 NLRB 624, 624 (1996) (collective action brought under FLSA was protected activity), abrogated on other grounds by Stericycle, Inc., 357 NLRB No. 61 (2011); Host International, 290 NLRB 442, 443 (1988) (multiple-plaintiff lawsuit "concerning working conditions" was protected activity); United Parcel Service, Inc., 252 NLRB 1015, 1016 (1980) (class action lawsuit regarding lunch breaks is protected activity), enforced, 677 F.2d 421, 422 (6th Cir.1982); Trinity Trucking & Materials Corp., 221 NLRB 364, 364 (1975) (filing of lawsuit by group of employees for failure to pay wages in accordance with contract was protected activity), enforced, 567 F.2d 391 (7th Cir.1977).

Further, under 29 U.S.C. § 158(a)(1), employers may not "interfere with, restrain, or coerce employees in the exercise of" an employee's rights under § 157. Citing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), and NLRB v. Stone, 125 F.2d 752, 756

(7th Cir.1942), the board concluded in Horton, 2012 WL 36274, at *7, that an employer interferes with an employee's right to engage in concerted activities by requiring her to sign an agreement that includes a prohibition on collective actions by employees. See also Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978) ("[T]he 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."). Finally, the board concluded that there is no conflict between the Federal Arbitration Act and the NLRA because the Federal Arbitration Act does not require the enforcement of arbitration agreements that conflict with substantive provisions of federal law.

Noting that "courts must give considerable deference to the Board's interpretations of the NLRA," ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994), I concluded that the board's decision was "reasonably defensible" and therefore controlling. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984). Accordingly, I invalidated the waiver on collective action in the arbitration agreement and I determined that the plaintiff must be allowed to join other employees to her case. Herrington v. Waterstone Mortgage Corp., No. 11-cv-779-bbc, 2012 WL 1242318, at **6-7 (W.D. Wis. Mar. 16, 2012).

Two years later (while the case was pending before the arbitrator), the employer sought reconsideration of the decision on the ground that new case law supported a view that employees cannot rely on the NLRA to invalidate arbitration provisions that prohibit joint litigation. The employer relied

primarily on D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013), a split decision in which the Court of Appeals for the Fifth Circuit declined to enforce the board's order invalidating the waiver on collective action. Although I denied the employer's motion on procedural grounds, I also analyzed the appellate court's decision in detail. I chose to adhere to the board's decision because "the majority never persuasively rebutted the board's conclusion that a collective litigation waiver violates the NLRA and never explained why, if there is tension between the NLRA and the FAA, it is the FAA that should trump the NLRA, rather than the reverse." Herrington v. Waterstone Mortgage Corp., 993 F. Supp. 2d 940, 943-46 (W.D. Wis. 2014). Further, the other cases cited by the employer did not include additional reasoning.

In this case, defendant does not identify any way to distinguish its collective action waiver from the waiver considered in Herrington. Although defendant asks the court to "reconsider its prior deference" to the board's decision, Dft.'s Br., dkt. #20, at 10, defendant does not challenge the reasoning in Herrington or otherwise develop an argument in favor of a different result. It simply cites the cases in which courts have declined to follow the board.

As I did in Herrington, 993 F. Supp. 2d at 941, "I acknowledge that the weight of authority ... favors defendant's view.... It may be that ultimately the Supreme Court or the Court of Appeals for the Seventh Circuit will agree with defendant, but until that time, I will adhere to the decision of the board." Accordingly, I am denying defendant's motion to dismiss.

ORDER

IT IS ORDERED that defendant Epic Systems Corporation's motion to dismiss, dkt. #19, is DENIED.

Entered this 10th day of September, 2015.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

APPENDIX C

EXHIBIT A TO DECLARATION OF TINA PERKINS FILED BY EPIC SYSTEMS CORPORATION

United States District Court
Western District of Wisconsin
No. 3:15-cv-00082
Filed: 04/15/15
ECF No. 22-1

MUTUAL ARBITRATION AGREEMENT REGARDING WAGES AND HOURS

April 2, 2014

Agreement to Arbitrate. Epic Systems Corporation ("Epic") and I agree to use binding arbitration, instead of going to court, for any "covered claims" that arise or have arisen between me and Epic, its related and affiliated companies, and/or any current or former employee of Epic or a related or affiliated company. I understand that if I continue to work at Epic, I will be deemed to have accepted this Agreement.

"Covered claims" are any statutory or common law legal claims, asserted or unasserted, alleging the underpayment or overpayment of wages, expenses, loans, reimbursements, bonuses, commissions, advances, or any element of compensation, based on claims of eligibility for overtime, on-the-clock, off-the-clock or other uncompensated hours worked claims, timing or amount of pay at separation, improper deductions

of pay or paid-time-off, fee disputes, travel time claims, meal or rest period claims, overpayment claims, claims of failure to reimburse or repay loans or advances, claims over improper or inaccurate pay statements, or any other claimed violation of wage-and-hour practices or procedures under local, state or federal statutory or common law.

I understand and agree that arbitration is the only litigation forum for resolving covered claims, and that both Epic and I are waiving the right to a trial before a judge or jury in federal or state court in favor of arbitration.

The Arbitrator shall have the authority to award the same damages and other relief that would have been available in court pursuant to applicable law. The arbitrator shall follow the rules of law of the state which is the employee's principal place of work, any applicable Federal law, and the rules as stated in this Agreement. The arbitrator shall have the authority to grant any remedy or relief that the arbitrator deems just and equitable and which is authorized by and consistent with applicable law, including applicable statutory or other limitations on damages.

Waiver of Class and Collective Claims. I also agree that covered claims will be arbitrated only on an individual basis, and that both Epic and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and.any arbitrator hearing my claim may not: (i) combine more than one individual's claim or claims into a single case;

(ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

At Will Employment Unchanged by this Agreement. Nothing in this agreement changes or in any manner modifies my relationship with Epic of employment-at-will.

Claims not Covered by this Agreement. Covered claims under this agreement do not include claims alleging discrimination, harassment, or retaliation. Also excluded from this agreement are any claims that cannot be required to be arbitrated as a matter of law. I also understand that I am not barred from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board or Equal Employment Opportunity Commission, or from filing a workers' compensation or unemployment compensation claim with respect to covered claims, though I am giving up the opportunity to recover monetary amounts from any such governmental agency related claim (e.g., NLRB or EEOC) and would instead be able to pursue a claim for monetary amounts through arbitration. I also understand that if a third party seeks to have Epic garnish my wages, I may be subject to third-party garnishment proceedings in court, even though such a dispute concerns my wages.

Right to Representation. Both Epic and I shall have the right to be represented by an attorney in arbitration. Neither side is entitled to its attorneys' fees except as provided for by applicable law.

How to File for Arbitration. To file a demand for arbitration:

1. The party desiring to pursue a legal dispute must prepare a written demand setting forth the claim(s). Epic will pay its own filing fees. If I initiate the arbitration, I will pay the lesser of the American Arbitration Association's then-current filing fee (as of this date, $200), or the then-current filing fee applicable in state court.
2. The employment dispute resolution rules of the American Arbitration Association ("AAA") effective at the time of my filing will apply. The current version of the rules can be found on pages 15-31 here: https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased. These rules are modified by the terms of this Agreement, including the following:
   a. Epic will pay the arbitrator's fees and the arbitration filing and administrative fees, less my initial payment for the applicable filing fee;
   b. Epic and I will each have the opportunity to "rank" our preference for the appointed arbitrator from a list of nine proposed arbitrators and the AAA will then appoint the arbitrator;
   c. The arbitrator shall have the authority to issue an award or partial award without conducting a hearing on the grounds that there is no claim on which relief can be granted or that there is no genuine issue of material fact to resolve at a hearing, consistent with Rules 12 and 56 of the Federal Rules of Civil Procedure ("FRCP");

d. Each party shall be entitled to only one interrogatory limited to the identification of potential witnesses, in a form consistent with Rule 33 of the FRCP;

e. Each party shall be entitled to only 25 requests for production of documents, in a form consistent with Rule 34 of the FRCP;

f. Each party shall be entitled a maximum of two (2) eight-hour days of depositions of witnesses in a form consistent with Rule 30 of the FRCP;

g. The arbitrator shall decide all disputes related to discovery and to the agreed limits on discovery and may allow additional discovery upon a showing of substantial need by either party or upon a showing of an inability to pursue or defend certain claims without such additional discovery;

h. The arbitrator must issue a decision in writing, setting forth in summary form the reasons for the arbitrator's determination and the legal basis therefor; and

i. The arbitrator's authority shall be limited to deciding the case submitted by the parties to the arbitration. Therefore, no decision by any arbitrator shall serve as precedent in other arbitrations except in a dispute between the same parties, in which case it could be used to preclude the same claim from being re-arbitrated.

Settlement. I may settle any dispute with the company at any time without involvement of the arbitrator.

Modifications and Amendments. I understand and agree that Epic may change or terminate this agreement after giving me 90 days written or electronic notice. Any change or termination will not apply to a pending claim.

Savings Clause & Conformity Clause. If any provision of this agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision, and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

Controlling Law. I agree that this agreement is made pursuant to and shall be governed under the Federal Arbitration Act.